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No. 90-

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1990

RICHARD A. DELGAUDIO, et al.,

Petitioners,

v.

BENJAMIN N. A. KENDRICK, JUDGE, CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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January 31, 1991

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QUESTION PRESENTED

Were petitioners' due process rights under the Fourteenth Amendment to an impartial judge violated by the refusal of the Supreme Court of Virginia to order recusal of the respondent judge in a pending libel suit against petitioners despite the close social and professional fraternity respondent shares with the plaintiff in that case and his unavoidable anger at petitioners for denouncing the National Lawyers Guild as a communist-front organization provoked because respondent had undertaken to be listed in a 1973 NLG referral directory and had apparently paid for the privilege?

LIST OF PARTIES

The parties to the proceedings below were petitioners, Richard A. Delgaudio, Cynthia K. Delgaudio, and Richard A. Delgaudio & Associates, Inc., and the respondent, Honorable Benjamin N. A. Kendrick, Judge, Circuit Court of Arlington County, Virginia. There are no parent companies or subsidiaries of Richard A. Delgaudio & Associates, Inc.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-

RICHARD A. DELGAUDIO, et al., Petitioners

v.

BENJAMIN N. A. KENDRICK, JUDGE, CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA, Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioners, Richard A. Delgaudio, et al., respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above-titled proceeding on October 3, 1990.

OPINIONS BELOW

The unelaborated orders of the Supreme Court of Virginia and the Circuit Court of Arlington County, Virginia are unreported. They are reprinted in the appendix to this petition, pp. 1 and 3, infra, respectively.

Pertinent portions of the Circuit Court's transcript of the hearing on the Motion to Recuse are reprinted in the appendix at 60.

JURISDICTION

Petitioners filed a Petition for a Writ of Prohibition in the Supreme Court of Virginia requesting an order directing the recusal of the Honorable Benjamin N. A. Kendrick, Judge of the Circuit Court of Arlington County, Virginia, in the pending litigation in the Circuit Court for the City of Alexandria styled

Hirschkop v. Bruce E. Eberle & Associates, Inc., et al., and Americans For a Sound Foreign Policy, et al., Law Nos. 9401 and 9403.

The Supreme Court of Virginia entered a final order denying the writ on October 3, 1990. On December 19, 1990, the Chief Justice of the United States entered an order extending the time to file a petition for certiorari in this case to and including January 31, 1991.

The jurisdiction of this Court to review the final judgment of the Supreme Court of Virginia is invoked under 28 U.S. Code 1257(1)[1]

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[1] See Cox Broadcasting v. Cohn, 420 U.S. 469, 481 (1975). In this case, petitioners' constitutional due process claims have been categorically rejected by Virginia state courts. On remand, if petitioners prevail on the merits, their federal claims will be mooted; but if petitioners lose on the merits, they would not be permitted to raise their due process claims again in state courts

CONSTITUTIONAL PROVISION AND AND STATUTE INVOLVED

1. Fourteenth Amendment.

"...[N]or shall any state deprive any person of life, liberty, or property, without due process of law..."

Virginia Canon 3(c)(a): "A judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

"To this end, he should abstain from performing or taking part in any judicial act in which his personal interests are involved...He should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is

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because they have been previously heard and denied. Walt Robbins, Inc. v. Damon Corp., 223 Va. 43, 348 S.E.2d 223 (1986); Wilson v. Volkswagen of America, Inc., 445 F. Supp. 1368 (E.D.Va. 1978).

affected by his kinship, rank, position or influence of any party or any person." (Virginia Canons of Judicial Conduct.)

STATEMENT OF THE CASE

The due process clause of the Fourteenth Amendment protects both against biased decision makers in adjudicatory proceedings and the substantial probability of unfairness. Withrow v. Larkin, 421 U.S. 35, 47 (1975). The latter circumstances may arise if the adjudicator possesses a pecuniary interest in the outcome, or if he has been the target of personal abuse or calumny by a party to the litigation. Id. Similarly, a substantial probability of bias insulting to due process may arise if the presiding judge has previously forged a warm and fraternal social and professional bond to one

litigating party, and has been indirectly attacked by that party's opponent. This case falls into the latter due process taxonomy.

A highly visible and chesty civil rights attorney, Philip J. Hirschkop, filed two motions for judgment in the Circuit Court for the City of Alexandria on December 10 and 11, 1984, sub. nom. Philip J. Hirschkop v. Bruce W. Eberle & Associates, Inc., et al. and Philip J. Hirschkop v. Americans for a Sound Foreign Policy, Inc., et al., Law Nos. 9401 and 9403. Petitioners were not defendants in those actions. Another action was commenced by Hirschkop in the Superior Court of the District of Columbia on June 4, 1986 alleging defamation, invasion of privacy, interference with business, reputation

and professional, among others. Petitioners were defendants in that action.

Petitioners filed a Motion to Dismiss the D.C. action on July 7, 1986, on the ground of forum non conveniens. On December 19, 1986, the D.C. court dismissed the action on the conditions that all defendants submit to service of process in Virginia and that the Alexandria Circuit Court exercise jurisdiction over the case.

On June 16, 1987, Hirschkop filed a First Amended Motion for Judgment in the Alexandria Circuit Court, naming petitioners as defendants and alleging libel, invasion of privacy and interference with Hirschkop's business, reputation and profession. A Second Amended Motion for Judgment was filed by

Hirschkop on October 23, 1987 (App. 14), after Circuit Judge Donald H. Kent granted several demurrers of defendants. The causes of action asserted in the Second Amended Motion for Judgment are based upon six direct-mail fund raising letters that mentioned Hirschkop's associations with the "radical ACLU and Communist National Lawyers Guild" in an unflattering light. (App. 21-23). Hirschkop claimed that this language and other language in the letters falsely associated him with communism and terrorism and, as a result, defamed him and interfered with this business. (App. 49-52).

Judge Kent, of the 18th Judicial circuit, presided over the case for approximately two years, ruling on several demurrers and discovery-based

motions. However, in June of 1988, Judge Kent and the other judges of the 18th Circuit recused themselves without explanation from further participation in the case. Thereafter, the Supreme Court of Virginia appointed Judge Kendrick to preside.

On December 20, 1989, petitioners filed a motion to recuse Judge Kendrick from any further participation in the Hirschkop cases. The recusal motion asserted that an appearance of partiality would taint Judge Kendrick's actions in this case because: (1) Judge Kendrick had worked as a law clerk in Hirschkop's law firm, (2) Judge Kendrick and Hirschkop enjoy a warm relationship exemplified by homey invitations to tea and (3) Judge Kendrick's name was listed along with Hirschkop's and but one other in the 1973

National Lawyers Guild Attorney Referral Directory. (App. 8-10). The National Lawyers Guild, its nature, makeup and status as a communist-front organization, all feature prominently in the Hirschkop lawsuit against petitioners, who have declaimed against the NLG as pernicious to the United States. (App. 9-10). Those declamations naturally rub Judge Kendrick raw because they manifestly imply harsh criticism of his prior NLG referral directory listing that he apparently initiated and secured by paying for the privilege.

An order denying the motion was entered on May 25, 1990. (App. 3-5). Judge Kendrick reasoned that recusal is not required if the presiding judge believes he can be impartial (App. 101-102), a standard, he intimated, that is

especially apt where a jury will be the fact finder (App. 64-65, 74-75).

Hirschkop conceded that he has known Judge Kendrick for twenty years, starting with Kendrick's clerkship in Hirschkop's office (App. 81). He further confessed that he sees Judge Kendrick socially two or three times a year, and within the last several years spent an hour in the Judge's home where he shared tea with this social colleague (App. 83). Hirschkop also cleverly resorted to flattery and friendship to sway Judge Kendrick on the recusal motion by crooning: "I think very highly of you; we've been friends for many years" (App. 86).

Swooning to Hirschkop's euphonious prose, Judge Kendrick tersely denied the recusal motion: "I don't see any problem

whatsoever in ruling on the legal issues in this case based solely on the merits, and it has nothing to do with Mr. Hirschkop or Mr. Durrette or anyone else. Legal issues are going to get a straight call from me to the best of my ability" (App. 102). That explanation was unresponsive to the substantial probability of bias standard articulated in Withrow v. Larkin, supra, and did not gainsay Judge Kendrick's fraternal relations with Hirschkop, and irresistible chilliness towards petitioners because of their castigation of the NLG, an organization with which Kendrick had previously associated in a lawyer directory and paid for the privilege (App. 9).

Petitioners sought a writ of prohibition in the Supreme Court of

Virginia ordering Judge Kendrick's recusal because of a substantial probability of bias that would be perceived by an objective observer. As Justice Frankfurter has lectured, "justice must satisfy the appearance of justice." Offut v. U.S., 348 U.S. 11, 14

(1954).[2]

Petitioners reiterated the arguments made to Judge Kendrick, and stressed that the probability of bias is strengthened where, as here, the case arouses hot emotions in parties and the presiding judge. For instance, Hirschkop's steamy

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[2] Petitioners claimed that recusal was required under Virginia Canon 3(c)(a) which so dictates when judicial "impartiality might reasonably be questioned." That standard, petitioners submit, is equivalent to the constitutional standard of due process. Both demand recusal when the probability of bias becomes so high that a reasonably objective bystander would be suspicious of actual judicial prejudice. See Robertson v. California, 111 S. Ct. 568 (1990) ("The appearance of evenhanded justice...is at the core of due process," Blackman dissenting, quoting from Mayberry v. Pennsylvania, 400 U.S. 455, 469 (1971)). In sum, the Supreme Court of Virginia was fairly presented with the opportunity to rule on the constitutional issue presented to this Court in the petition for certiorari, although the talismanic words "due process" were not expressly mentioned.

attitude was illustrated by his arguments before Judge Kendrick that (1) the petitioners constitute "the lunatic fringe of the right wing of this country" (App. 88); (2) the petitioners want a judge who is "Atilla the Hun," "right wing of Jerry Falwell," or someone who thought Hirschkop was "a commie and should have been locked up 20 years ago" (App. 88); (3) the petitioners' Memorandum in Support of the Motion to Recuse contained "McCarthy-ism" (App. 90); (4) one of the defendants was a "draft-dodger" (App. 92); (5) the petitioners' fund-raising operations were a "scam" and raised millions of dollars by "scaring old people" (App. 91-92); and (6) the Motion to Recuse was a "ruse" (App. 95).

Judge Kendrick's emotions would naturally be aroused by petitioners' identification of the NLG as a communist front group and other derogatory references made of the organization. (App.9-11). Kendrick and Hirschkop were two of the three Virginian lawyers listed in the 1973 NLG Referral Directory, which declares that listees have both applied and paid a fee for inclusion. Moreover, Hirschkop's suit against petitioners before Kendrick alleges that several statements associating Hirschkop with the communist NLG were false, defamatory, and malicious. (App. 26-34). How could Kendrick maintain an Olympian neutrality in appraising those allegations when he himself apparently undertook to be listed in an NLG legal directory and paid a fee for the privilege? A defamation ruling

in favor of Hirschkop by Judge Kendrick would simultaneously vindicate his own reputation and character as unsullied by any Communist taint despite his 1973 NLG listing.

Without oral argument and without intellectual adornment, the Supreme Court of Virginia denied petitioners' request for a writ of prohibition on October 3, 1990.

REASON FOR GRANTING THE WRIT

The Supreme Court of Virginia flouted this Court's unambiguous teaching in Withrow v. Larkin, 421 U.S. 35 (1975) that constitutional due process prohibits any substantial probability of judicial bias. The defiance is so extreme as to justify this Court's review and reversal. See Rule 17.1(c) of the Supreme Court of the United States.

Judge Kendrick flagrantly erred in refusing petitioners' recusal motion, and the Supreme Court of Virginia endorsed the error in denying a writ of prohibition to the same end. Kendrick erred in apparently believing that judicial prejudice is harmless in jury cases (App. 64-65). That conclusion is wrong. Judges rule on important legal issues whether or not a jury is the fact finder in the case. For instance, in this case Judge Kendrick will rule on whether plaintiff Hirschkop is a "public figure" subject to the "actual malice" rule of New York Times v. Sullivan, 376 U.S. 254 (1964).

Judge Kendrick further erred in asserting that recusal is not required if the presiding judge subjectively believes he can be impartial (App. 102). The due

process standard, however, is whether there is a substantial probability that bias would be perceived or suspected by an objective bystander. Withrow v. Larkin, supra, at 47. "Justice must satisfy the appearance of justice," Robertson, 111 S. Ct. at 568 (Blackman dissenting, quoting In re Murchison, 349 U.S. 133 (1955)).

Finally, both Judge Kendrick and the Supreme Court of Virginia manifestly erred in failing to find such a substantial probability of bias in this case. Kendrick's substantial probability of favoritism for plaintiff Hirschkop was shown by the following facts: (1) a twenty year fraternal relationship beginning with Judge Kendrick's clerkship in Hirschkop's law office; (2) a regular social fraternity between Kendrick and

Hirschkop symbolized on one occasion by the Judge's invitation to Hirschkop to share tea in the former's home and (3) Hirschkop's undisguised brandishing of flattery and friendship to sway Kendrick on the recusal motion ("I think very highly of you; we've been friends for many years").

In addition to Kendrick's probable favoritism towards Hirschkop, the Judge is likely to display prejudice against petitioners. They have thundered against the National Lawyers Guild, characterizing it as "Communist" and noting its official listing as a communist-front organization by a congressional committee. Hirschkop has alleged that these NLG characterizations in juxtaposition with his name makes petitioners liable for defamation and

interference with business relations.

One potential legal issue raised by Hirschkop's defamation claim is whether his associations with the NLG, including the listing he shared with Judge Kendrick in its 1973 referral directory, proved his attachment to principles of Communism. A negative ruling by Judge Kendrick would concurrently clear himself of reputational taint because of his 1973 NLG listing. In sum, Kendrick is saddled with a personal reputational interest against petitioners and in favor of Hirschkop on an important legal issue raised by Hirschkop's defamation claim. That fact, standing alone, japes at petitioners' constitutional due process rights to an impartial judge in the Hirschkop litigation.

CONCLUSION

For the reasons previously elaborated, this petition for certiorari should be granted to safeguard the fundamental due process right to an impartial tribunal from the neglect or contempt of state judges.

Respectfully submitted,
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Counsel of Record
Counsel for Petitioners

January 31, 1991

APPENDIX

V I R G I N I A :

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON WEDNESDAY THE 3RD DAY OF OCTOBER, 1990.

In Re: Richard A. Delgaudio, et al, Petitioners

Record no. 900821

Upon a Petition for a Writ of Prohibition

On consideration of the petition and memorandum of law in support thereof, of Richard A. Delgaudio and others, filed by counsel, praying that a writ of prohibition do forthwith issue, to be directed to the Honorable Benjamin N. A. Kendrick, Judge of the Circuit Court of Arlington County, the demurrer, motion to dismiss and memorandum of law in support filed in response on behalf of the

respondent judge, the Court is of opinion that the writ of prohibition should not issue as prayed for. It is therefore ordered that the said petition be dismissed and that the respondent recover of the petitioner his costs by him expended about his defense herein.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

Respondent's costs:

Attorney's Fee $50.00

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

PHILIP J. HIRSCHKOP Plaintiff, v. BRUCE W. EBERLE & ASSOCIATES, et al. Defendants.	)	At Law No. 9401 At Law No. 9403

ORDER

This matter came before the Court on the 16th day of March, 1990 upon the Motion of Richard A. Delgaudio, Cynthia K. Delgaudio, and Richard A. Delgaudio and Associates, Inc. for the Court to recuse itself, which motion was joined by the Eberle defendants; and

The Court having considered the various pleadings of the parties and the arguments of counsel;

Said motion be and hereby is denied for the reasons stated from the bench.

ENTERED THIS 25TH DAY OF MAY, 1990.

BENJAMIN N. A. KENDRICK
Circuit Judge

SEEN AND AGREED:

PHILIP J. HIRSCHKOP, pro se
108 North Columbus Street
Post Office Box 1417 A-49
Alexandria, Virginia 22313

SEEN AND OBJECTED TO:

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Eugene Delgaudio

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

PHILIP J. HIRSCHKOP,

Plaintiff,

v. **At Law No. 9401**
At Law No. 9403

BRUCE W. EBERLE & ASSOCIATES, INC., et al.,

and

AMERICANS FOR A SOUND FOREIGN POLICY, INC., et al.,

Defendants.

MOTION TO RECUSE

COME NOW the defendants, Richard A. Delgaudio, Cynthia K. Delgaudio, and Richard A. Delgaudio and Associates, Inc., and respectfully request that Judge Benjamin N. Kendrick recuse himself from presiding over matters concerning this

case for the following reasons:

Philip J. Hirschkop, a well-known attorney in Northern Virginia, filed this lawsuit alleging that the above-named defendants, among others, defamed him by participating in the production of direct mail letters which referred to Mr. Hirschkop, inter alia, as "Communist National Lawyers Guild Attorney Phil Hirschkop". These defendants contend that neither here nor elsewhere did they call Mr. Hirschkop a communist, but merely called The National Lawyers Guild communist and inferred (and then directly stated) that Mr. Hirschkop was associated with that group. In June, 1988, the parties became aware that Judge Kent, the Judge who had been hearing argument in this case since its transfer from the District of Columbia more than two years

earlier, and other members of the Alexandria Bench recused themselves. Judge Kendrick was then appointed to hear the case.

It has come to the attention of these defendants that, at one time, Judge Kendrick served as a law clerk in Mr. Hirschkop's firm for at least a few weeks. Also counsel for Delgaudio has been told by members of the Arlington bar of a general perception that there is a long-standing relationship of a close, personal nature, and frequent joint social activities between Judge Kendrick and Mr. Hirschkop. This perception counsel cannot evaluate with any accuracy, but only hears that it exists.

Furthermore, there is currently before the Virginia Court of Appeals a Petition brought by Stephen C. Yohay, in which he

has asked the appellate court to reverse rulings made by Judge Kendrick, at least in part, on the grounds that Judge Kendrick was biased in favor of Mr. Hirschkop, who was only counsel in the case, not a party as he is in this matter.

Finally, and most importantly, the defendants have learned that in 1973 Judge Kendrick, along with Mr. Hirschkop and one other attorney, may have requested and may have paid a fee for the National Lawyer Guild (NLG) to include his name in the Guild Referral Directory of Attorneys for Virginia. Exhibits A and B. The political nature of the NLG may be the centerpiece of this trial. The defendants contend that someone whose political views were sufficiently far to the left that they would seek association

with groups like the NLG could not have been affirmatively damaged by the mailings in this case. Further, it is obvious from the letters in question that the defendants believe the views and activities of the NLG are inimicable to the best interest of the United States. Consequently, anyone with views sufficiently similar to those of Hirschkop as to be motivated to place his name upon the NLG referral list could hardly be perceived as impartial in judging the issues at stake.

Cannon II(A) of the Cannons of Judicial Conduct for the Commonwealth of Virginia states that "[a] judge should respect and comply with the law and conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Cannon

III, Section C(a) on disqualification states, "[a] judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Because of the allegations of Judge Kendrick's bias in favor of Mr. Hirschkop, and Judge Kendrick's apparent association with the NLG, a group whose views and activities the defendants consider inimicable to the best interest of the United States, these defendants believe there is substantial likelihood that Judge Kendrick would be unable to be truly impartial in this case. At least, there is an obvious appearance of partiality, such that Judge Kendrick's "impartiality might reasonably be questioned."

Therefore, in order to avoid even the appearance of impropriety, the movants respectfully request that Judge Kendrick recuse himself.

RICHARD A. DELGAUDIO &
ASSOCIATES
RICHARD A. DELGAUDIO
CYNTHIA K. DELGAUDIO

BY COUNSEL

COUNSEL:

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Bradley B. Cavedo
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DURRETTE, IRVIN & LEMONS, P.C.
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Recuse was telecopied and mailed, postage prepaid on this 20th day of December, 1989, to Philip J. Hirschkop, Esq., 108 North

Columbus Street, Post Office Box 1417-A49, Alexandria, Virginia 22313; telecopied and mailed to John D. McGavin, Esq., 4117 Chain Bridge Road, Suite 400, Post Office Box 250, Fairfax, Virginia 22030; telecopied and mailed to Fred H. Codding, Esq., 10382 Main Street, P.O. Box 225, Fairfax, Virginia 22030; and to Nicholas S. McConnell, Esq., 1008 North Randolph Street, Suite 104, Arlington, Virginia 22201.

_____
Wyatt B. Durrette, Jr.

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

PHILIP J. HIRSCHKOP	:	
	:	
Plaintiff,	:	
	:	
v.	:	**LAW NOS. 9401**
	:	**9403**
	:	
	:	
AMERICANS FOR A SOUND FOREIGN POLICY, INC., et al.,	:	
	:	
Defendants.	:	
	:	

SECOND AMENDED MOTION FOR JUDGMENT

Philip J. Hirschkop, by counsel, brings this Second Amended Motion for Judgment against the named defendants and complains and alleges as follows:

Parties

1. Plaintiff Philip J. Hirschkop is an attorney licensed in the District of Columbia, the Commonwealth of Virginia,

and the State of New York, with law offices located in the City of Alexandria, Virginia.

2. Defendant Americans for a Sound Foreign Policy, Inc. (hereinafter "ASFP") is a Virginia corporation with its principal offices at 418 C Street, N.W., Washington, D.C. 20002.

3. Defendant Phillip Abbott Luce, at all times relevant hereto, was president of defendant ASFP. He is sued both individually and as an officer of ASFP.

4. Defendant Noelle Luce is the wife of defendant Phillip Abbott Luce and personally participated in the conspiracy to defame and otherwise injure plaintiff as alleged herein.

5. Defendant Eugene A. Delgaudio, at all times relevant hereto, a was an employee of ASFP and held the position of

administrator of the organization.

6. Defendant Bruce W. Eberle & Associates, Inc. (hereinafter "Eberle & Associates") is a Virginia stock corporation engaged in the business of fee-for-service direct mail fundraising, with its principal offices in Vienna, Virginia.

7. Defendant Omni Direct Mail Services, Ltd. (hereinafter "Omni") is a Virginia stock corporation, with its principal offices in Kearneysville, West Virginia. One hundred percent of Omni's stock is owned by defendant Eberle & Associates. Omni provides the mailing and distribution services for defendant Eberle & Associates and mailed and distributed certain of the defamatory communications described herein.

8. Defendant Omega List Company is a Virginia stock corporation with its principal offices in Vienna, Virginia. One hundred percent of Omega List Company's stock is owned by Eberle & Associates. Omega List Company owns and brokers the mailing lists used by defendant Eberle & Associates in its direct mail fundraising business. Omega List Company maintained and provided the mailing lists for sending certain of the defamatory communications described herein.

9. Computer Communications, Inc. (hereinafter called "CCI"), is a Virginia stock corporation, with its principal offices located in Vienna, Virginia. One hundred percent (100%) of the CCI stock is owned by defendants Bruce Eberle and his wife, Katherine. CCI provided the

computer services for the defendants in this action for the generation of the defamatory communications described herein.

10. Defendant Bruce W. Eberle is the president and a director of Eberle & Associates and president and a director of defendant Omni, defendant Omega List Company, and defendant Computer Communications, Inc. He and his wife, defendant Katherine Eberle, are the sole stockholders of Eberle & Associates. Bruce and Katherine Eberle also are original incorporators of defendant ASFP. As set forth more fully herein, defendant Bruce Eberle personally participated in and/or ratified the distribution of certain of the defamatory mailings that are the subject of this action. Bruce W. Eberle is sued both individually and as

an officer and director of these defendant corporations.

11. Defendant Katherine Eberle is the wife of defendant Bruce Eberle and a director and secretary/treasurer of Eberle & Associates, defendant Omni, defendant Omega List Company, and defendant Computer Communications, Inc. Along with her husband, Bruce Eberle, Katherine Eberle is one of the original incorporators of defendant ASFP. As set forth more fully herein, defendant Katherine Eberle personally participated in and/or ratified the distribution of certain of the defamatory mailings that are the subject of this action. Katherine Eberle is sued both individually and as an officer and director of these defendant corporations.

12. Defendant Thomas A. DeWeese at times relevant hereto was an employee and senior account executive at defendant Eberle & Associates. At all times relevant hereto, he has been responsible for work by Eberle & Associates on behalf of defendant ASFP.

13. Richard Delgaudio & Associates, Inc. is a Virginia corporation engaged in the business of fee-for-service direct mail fundraising, with its principal offices at 12218 Ox Hill Road, Vienna, Virginia.

14. Defendant Richard Delgaudio, at times relevant hereto, was an employee of defendant Eberle & Associates. At other times relevant hereto, he was a director and incorporator of Richard Delgaudio & Associates, Inc. He is sued both individually and in his official

capacity.

15. Defendant Cynthia Delgaudio, at all times relevant hereto, was an officer and director of Richard Delgaudio & Associates, Inc. and is sued by individually and in her official capacity.

Facts

16. The defendants, individually and conspiring together as alleged herein, caused tortious injury to the plaintiff within the Commonwealth of Virginia by engaging in a persistent course of conduct in the Commonwealth of Virginia, in that they caused to be distributed in the Commonwealth of Virginia and elsewhere the defamatory statements set out herein.

Defamatory Mailings

17. On or about December 12, 1983, defendants caused to be written and caused to be sent to thousands of persons throughout the United States, including the Commonwealth of Virginia, the letter attached hereto as Exhibit A and incorporated herein by reference.

18. Exhibit A purports to be a fundraising letter, seeking litigation funds on behalf of ASFP, one of several defendants in an action captioned Madalyn Murray O'Hair v. William D. McCain, et al., Civil Action No. 83-0905-A (Eastern District of Virginia, Alexandria Division), in which plaintiff represented Madalyn Murray O'Hair.

19. Exhibit A specifically names plaintiff and contains the following, false, defamatory, and malicious

statements concerning him:

> Atheist O'Hair has turned radical left's big guns against ASFP by recruiting radical ACLU and Communist National Lawyers Guild attorney, Philip Hirschkop. Same National Lawyers Guild currently defending Weather Underground Terrorists.

20. When plaintiff learned that ASFP and others were distributing these defamatory letters, plaintiff immediately informed counsel for the defendants in the O'Hair action that the mailings were false, malicious and bore no relationship whatsoever to the truth. Plaintiff served in the Armed Forces as a Green Beret in the 77 Special Group Forces, Airborne, and was honorably discharged from military service. As a military service member, plaintiff took an oath to uphold the Constitution and preserve American ideals and principles, including

a willingness to put his life on the line, if duty demanded it. Further, plaintiff, as an attorney and officer of the court, has given his allegiance to uphold the Constitution and the laws of this country. The defendants' libelous statements associating plaintiff with Communism and terrorism were clearly incompatible with both plaintiff's professional and personal values.

21. Plaintiff informed counsel for the defendants that he was offended and angered by the defamatory statements and that he was considering taking legal action. Later, plaintiff did take legal action against the defendants by filing motions for judgment in the Circuit Court for the City of Alexandria.

22. Plaintiff was assured by counsel for several of the defendants in the

O'Hair litigation that all of the defendants were aware of plaintiff's denials of the statements contained in Exhibit A and aware that plaintiff was greatly offended and angered by the publication of those statements. Defendants' counsel assured plaintiff that the defendants were concerned about plaintiff's reaction and that they would not undertake any further mailings referring to plaintiff nor repeat or republish the defamatory statements. Counsel for defendants stated that he would cease representing his clients should they publish any other statements defaming plaintiff.

23. Despite the assurances of their counsel, defendants caused to be published and disseminated additional mailings making false, defamatory and

malicious statements concerning plaintiff.

24. On or about June 3, 1985, defendants caused to be written and caused to be sent the letter attached hereto as Exhibit B and incorporated herein by reference. Defendants sent the letter to thousands of persons throughout the United States, including the Commonwealth of Virginia.

25. Exhibit B purports to be a fundraising letter, seeking litigation funds on behalf of ASFP.

26. Exhibit B specifically names the plaintiff and contains the following false, defamatory and malicious statements concerning him:

> Radical Hirschkop says I and ASFP lied when we proclaimed during ASFP's fight with Madalyn Murray O'Hair:

"Atheist O'Hair has turned radical left's big guns against ASFP by recruiting radical ACLU and Communist National Lawyers Guild attorney, Philip Hirschkop, same National Lawyers Guild currently defending Weather Underground Terrorists."

I and ASFP spoke truth. Will prove it in court.

Radical left big guns, Communist party USA want Americans For A Sound Foreign Policy silenced forever, me ruined personally.

27. On or about June 14, 1985, defendants caused to be written and caused to be sent to thousands of persons throughout the United States, including the Commonwealth of Virginia, the letter attached hereto as Exhibit C and incorporated herein by reference.

28. Exhibit C purports to be a fundraising letter, seeking litigation funds on behalf of ASFP.

29. Exhibit C specifically names plaintiff and contains the following false, defamatory and malicious statements concerning him:

> Lawyer Hirschkop worked hand in glove with American Civil Liberties Union which uses laws of this country for radical left causes. Has done bidding of Communist front "National Lawyers Guild."
>
> Don't know if he was paid by ACLU & NLG or if he felt such strong kinship with radical left and Communists that he donated his time.
>
> This man Hirschkop has years & years of experience fighting for ACLU and Communist National Lawyers Guild causes in America's courtrooms.

30. On or about June 28, 1985, defendants caused to be written and caused to be sent to thousands of persons throughout the United States, including the Commonwealth of Virginia, the letter

attached hereto as Exhibit D and incorporated herein by reference.

31. Exhibit D purports to be a fundraising letter, seeking litigation funds on behalf of ASFP.

32. Exhibit D specifically names plaintiff and contains the following false, defamatory and malicious statements concerning him:

> ...Attorney Hirschkop has worked with the National Lawyers Guild (NLG), cited by the U.S. Congress as an agent of the Communists in the Soviet Union.
>
> He walks like a duck, he quacks like a duck, he hangs around with the ducks. Now Hirschkop is angry because I focused attention on the facts of his career.
>
> ...In choosing to associate with the National Lawyers Guild, Philip Hirschkop made himself an enemy of my beloved country.

33. Defendants caused to be written and caused to be sent to thousands of persons throughout the United States, including the Commonwealth of Virginia, the letter attached hereto as Exhibit E and incorporated herein by reference.

34. Exhibit E purports to be a fundraising letter, seeking litigation funds on behalf of ASFP.

35. Exhibit E specifically names plaintiff and contains the following false, defamatory and malicious statements concerning him:

> ...[t]his man Hirschkop had enormous experience in the courts fighting to achieve the objectives of the ultra-liberal American Civil Liberties Union, and the communist-front, National Lawyers Guild.
>
> ...It seems he resents my speaking out about the truth: that his buddies at the National Lawyers Guild are a Communist front organization.

> The NLG aims to use the laws of this country to destroy it. They have been described by the Congress of the United States as an agent of the Soviet Union.
>
> Now it is a fact that Philip Hirschkop has worked with these people.

36. Defendants caused to be written and caused to be sent to thousands of persons throughout the United States, including the Commonwealth of Virginia, the letter attached hereto as Exhibit F and incorporated herein by reference.

37. Exhibit F purports to be a fundraising letter, seeking litigation funds on behalf of ASFP.

38. Exhibit F specifically names plaintiff and contains the following false, defamatory and malicious statements concerning him:

> ...he has been associated with the Communist -- I repeat, Communist --

> National Lawyers Guild, which advances the Kremlin Party line of using our own laws and courts to destroy the United States of America.
>
> ...In choosing to associate with the National Lawyers Guild, Philip Hirschkop made himself an enemy of my beloved country.
>
> ...If I and ASFP give up now and do not meet Philip Hirschkop in court, he wins by default.
>
> ...I and ASFP must counter attack and show the American people how Communism is working to use our courts to subvert our values and destroy our constitution.

39. These statements contained in Exhibits A-F are only a sample of the false, defamatory and malicious statements contained in these communications. The statements in Exhibits A-F, taken in context, are clearly designed to associate the

plaintiff with Communism and terrorist principles. Any reasonable person reading these statements would be led to believe that Philip Hirschkop is a Communist, that he espouses Communist principles and that he endorses, supports and defends terroristic activity as engaged in by the Weather Underground.

40. Defendants fabricated and disseminated these malicious lies about plaintiff to defame him, to interfere with and to injure his business and community reputation, and to solicit money from persons who would be aroused and angered by these inflammatory false representations about plaintiff. The defamatory mailings were sent to thousands of individuals across the United States, some of whom were clients or potential clients of plaintiff. In

addition, colleagues and associates of plaintiff received certain of the mailings. At the time the defamatory letters were sent, the defendants knew that the distribution of these materials associating plaintiff with Communism and terrorism would cause injury and harm to plaintiff in his profession as an attorney. Defendants disseminated Exhibits A-F with the specific intent of causing injury and harm to plaintiff.

Conspiracy Allegations.

41. Exhibits A-F are signed by Phillip Abbot Luce, president of ASFP. Defendant Luce ratified and approved the conduct of ASFP employees and personally participated in the creation and dissemination of these defamatory letters, even though he knew or should have known that the letters contained

false and malicious statements about the plaintiff.

42. ASFP is a straw corporation set up by Bruce W. Eberle & Associates, Inc. a Virginia corporation engaged in direct mail fundraising, as a front to fraudulently solicit money solely for the economic benefit of defendants Bruce W. Eberle & Associates, Inc. and its officers and directors. In fact, Bruce Eberle, president of Bruce W. Eberle & Associates, Inc., Katherine Eberle, its secretary/treasurer, and Dennis Frame, an employee of Eberle & Associates, Inc., were the original incorporators and directors of ASFP. To date, defendants Eberle & Associates, Inc. and its officers and directors have received thousands of dollars in response to various of the defamatory mailings. The

other defendants also have received substantial personal profits and benefits from publication of the false and defamatory statements in Exhibits A-F concerning plaintiff.

43. In or about November, 1983, the defendants ASFP, Phillip Abbott Luce and Eugene A. Delgaudio conspired among themselves and with others to solicit monies ostensibly for the payment of attorney fees in defending the lawsuit filed by Madalyn Murray O'Hair. To this end, these defendants contacted defendant Thomas A. DeWeese, then an employee of defendant Eberle & Associates and the senior account executive assigned to defendant ASFP's accounts. Based in part upon false and defamatory information supplied to him by defendants Luce and Delgaudio, defendant DeWeese drafted

Exhibit A and the defamatory statements contained therein. None of these defendants made any effort to ascertain the truth or falsity of the defamatory statements contained in Exhibit A.

44. At the request of defendant Phillip Abbott Luce, Noelle Luce personally reviewed Exhibit A, as well as various of the subsequent mailings, prior to their distribution and ratified and approved the dissemination of these defamatory letters. Noelle Luce actively encouraged and advocated the distribution of the letters by saying to Phillip Abbott Luce "go get that s.o.b." or words to this effect. Noelle Luce took these actions without making any effort to ascertain the truth or falsity of the defamatory statements and/or notwithstanding her knowledge of the

false nature of the statements made.

45. At the time Exhibit A was created, defendant Richard A. Delgaudio was employed by Eberle & Associates as Executive Vice President for Creative Services. Defendant Richard Delgaudio personally reviewed Exhibit A prior to its mailing and approved its dissemination and circulation without making any effort to ascertain the truth or falsity of the defamatory statements and/or notwithstanding his knowledge of the false nature of the statements made. Defendant Richard Delgaudio participated in the circulation of Exhibit A by joining the defendants Phillip Abbott Luce and Eugene Delgaudio to decide what mailing list to use. Further, Richard and/or Eugene Delgaudio discussed with various vendors the use of the mailing

list.

46. Based upon instructions from defendant Phillip Abbott Luce, defendant Eugene Delgaudio oversaw the production and mailing of Exhibit A, as well as the other defamatory mailings, Exhibits B-F. On or about December 12, 1983, Exhibit A was processed, mailed and distributed to thousands of persons across the country by agents and employees of Computer Communications, Inc., Omni List Company and Omni Direct Mail Services, Ltd., all wholly owned subsidiaries of defendant Eberle & Associates.

47. Defendants Bruce and Katherine Eberle ratified and approved the conduct of their employees and corporations in sending out this defamatory letter, even though they knew or should have known that the letter contained false and

malicious statements about plaintiff. Further, Exhibit A was fabricated and distributed while Bruce and Katherine Eberle were defendants in the action brought by Madalyn Murray O'Hair to stop the publication of defamatory "fundraising letters" using her name; nevertheless, these defendants took no steps to ascertain the truth or falsity of the defamatory statements concerning the plaintiff.

48. Following the distribution of Exhibit A, several of the defendants, through their counsel in the O'Hair litigation, were specifically informed by plaintiff of the false and malicious nature of the statements in Exhibit A. The defendants were placed on further notice of the false and defamatory statements in Exhibit A when plaintiff

filed two libel cases in the Circuit Court for the City of Alexandria, Virginia arising out of the publication of those statements: Hirschkop v. Americans For A Sound Foreign Policy, Inc., et al., Law No. 9403 and Hirschkop v. Bruce W. Eberle & Associates, et al., Law No. 9401. Plaintiff was assured by defendants' counsel that his clients were concerned about the matter and that further mailings would be made.

49. Despite Notice that plaintiff had no association with communism or terrorists and assurances that the defendants would not publish any additional defamatory statements, defendants created, disseminated and published Exhibits B-F, all of which exhibits contain libelous statements about plaintiff. Thus, prior to the

publication of Exhibits B-F, the defendants were on full notice of the falsity of the statements.

50. The creation of Exhibit B began in or about April, 1985, when defendant Phillip Abbott Luce contacted defendant Richard Delgaudio, who at the time still an employee of Bruce Eberle & Associates. At that time, defendants Luce and Delgaudio conspired to distribute further fundraising mailings, referring to plaintiff and the lawsuit that plaintiff had filed against ASFP. Defendant Richard Delgaudio was informed by Phillip Abbott Luce and Eugene Delgaudio that plaintiff had denied the allegations set forth in Exhibit A and that there was a likelihood that they would be sued for distributing other similar mailings referring to plaintiff.

51. During this period, defendant Richard Delgaudio wrote several drafts of the letter that became, in final form, Exhibit B. Defendant Richard Delgaudio's activities on behalf of ASFP were ratified and approved by Eberle & Associates, Inc., and its officers and directors, Bruce W. Eberle and Katherine Eberle. Exhibit B also was reviewed and approved by Phillip and Noelle Luce and Eugene Delgaudio.

52. In or about May, 1985, Richard A. Delgaudio left the employ of Bruce Eberle & Associates. Upon information and belief, prior to leaving, it was decided among Bruce Eberle, Richard Delgaudio, Phillip Abbott Luce and others that when Richard Delgaudio left Eberle & Associates, his new company would take the ASFP account and that subsequent ASFP

mailings would be performed by defendant Richard A. Delgaudio & Associates, Inc.

53. In or about May, 1985, defendant Richard A. Delgaudio & Associates was incorporated with officers and directors being defendants Richard and Cynthia Delgaudio. The offices of defendant Delgaudio & Associates are in the basement of the home of defendants Richard and Cynthia Delgaudio.

54. On or about June 3, 1985, Exhibit B was mailed to thousands of persons across the country selected by agents and employees of Richard A. Delgaudio & Associates, including Richard and Cynthia Delgaudio. The mailing was performed at the direction of ASFP and its employees, including defendants Phillip Abbott Luce and Eugene Delgaudio.

55. Defendant Cynthia Delgaudio participated in the production, processing, mailing and distribution of Exhibit B by engaging and contracting with various vendors to supply services. Defendant Computer Communications, Inc., ("CCI"), 100% of which stock is owned by defendants Bruce and Katherine Eberle, provided the computer services for the creation and dissemination of Exhibit B. These services included among other things the physical creation of the format of the letter and the selection of the list of persons to whom the letter was mailed.

56. The creation, publication and dissemination of Exhibits C-F followed a pattern similar to that for the circulation of Exhibit B. Exhibits C-F were composed by defendants Phillip

Abbott Luce, Eugene Delgaudio and Richard Delgaudio. Prior to distribution, Exhibits C-F were reviewed by defendant Noelle Luce who approved and encouraged their dissemination.

57. The activities of defendants Luce and Delgaudio also were known, approved and ratified by defendants Bruce and Katherine Eberle who were defendants in the lawsuit for which Exhibits C-F purportedly were raising funds to defend. Defendant Cynthia Delgaudio aided and abetted the distribution of the false and defamatory mailings by engaging and contracting with various vendors to supply production, processing, mailing and distribution services.

58. None of the defendants took any steps, even in light of the ongoing litigation, to ascertain the truth or

falsity of the statements concerning plaintiff contained in Exhibits B-F or to prevent the publication of these defamatory statements. Instead, defendants published these false and malicious statements with knowledge of their falsity or with reckless disregard for their truth or falsity.

59. The defendants have continued to carry out their conspiracy to defame and injure plaintiff in ways in addition to the publication and dissemination of the false and malicious fundraising letters. In December, 1985, defendant Eugene Delgaudio organized a reception for defendants Phillip Abbott Luce and ASFP to "honor their on-going fight with Madalyn Murray O'Hair and her allies." The reception committee members included defendant Richard Delgaudio and

individuals prominent in the conservative fundraising movement including Richard Viguerie, Terry Dolan and others. The reception was held at DejaVu in Washington, D.C. described by defendants as the place "where the conservative network meets."

60. At that reception, slanderous statements concerning plaintiff were made by defendant Phillip Abbott Luce and others. For example, plaintiff was described as being an attorney with Marxists associations who brought the instant litigation to destroy the Constitution in favor of the dictatorship of the proletariat. Further, defendant Luce threatened that plaintiff should withdraw this lawsuit and agree not to file any other lawsuits against Luce or ASFP, otherwise plaintiff would face dire

consequences or words to that effect.

Causes of Action

COUNT I - DEFAMATION

61. Paragraphs 1 through 60 are incorporated herein by reference.

62. The letters created and distributed by defendants, set forth above as Exhibits A-F, contain the false and malicious statements quoted above, holding plaintiff up to the public scorn and ridicule. Further, these statements affect plaintiff directly in his business, trade and profession, and as such, constitute defamation per se.

63. Defendants published these false and malicious statements concerning plaintiff either negligently and/or with reckless disregard for their truth or falsity.

64. As a result of defendants' conduct, plaintiff has suffered out-of-pocket expenses, injury to his reputation, embarrassment, humiliation and emotional distress.

COUNT II - APPROPRIATION AND UNJUST ENRICHMENT

65. Paragraphs 1 through 64 are incorporated herein by reference.

66. Defendants' conduct, as set forth above, constitutes a violation of Virginia Code §8.01-40 by appropriating plaintiff's name without his consent for trade and commercial purposes. Defendants, by engaging in a fraudulent scheme to solicit money on behalf of a bogus front organization solely for their economic benefit, have appropriated plaintiff's name solely for trade and commercial purposes. Defendants' conduct was carried out willfully, maliciously

and in wanton disregard of plaintiff's rights.

67. As a result of defendants' conduct, the defendants have been unjustly enriched and plaintiff has suffered damage to his reputation, humiliation, emotional distress, and out-of pocket expenses.

COUNT III - VIOLATION OF VIRGINIA CODE §§ 18.2-499 & 500

68. Paragraphs 1 through 67 are incorporated herein by reference.

69. Defendants' actions, as set forth above, were taken for the purpose of willfully and maliciously injuring plaintiff in his business, reputation and profession. The conduct of ASFP, Phillip Abbott Luce and Eugene Delgaudio, in conspiring with and procuring the cooperation and assistance of defendants Eberle & Associates (and its affiliated

corporations), Bruce and Katherine Eberle, Richard A. Delgaudio & Associates, Richard and Cynthia Delgaudio, Thomas A. DeWeese, and other defendants for this improper purpose, constitutes a violation of Virginia Code §§ 18.2-499 and 500.

70. As result of the defendants' conduct, the plaintiff has been injured in his business, reputation and profession, and the defendants have been unjustly enriched.

COUNT IV - COMMON LAW CONSPIRACY

71. Paragraphs 1 through 70 are incorporated herein by reference.

72. The defendants and each of them conspired with one or more of the other defendants to defame and exploit for their own personal benefit and profit and good name of the plaintiff through the

willful and intentional actions described in paragraphs 1 through 70 above.

73. It was an object of the conspiracy to organize a fundraising campaign which would use the United States mailing and interstate wires to distribute literature that a contribution to and for the benefit of the defendants was of assistance in defeating Communism.

74. It was an object of the conspiracy that the defendants would utilize the funds to assist them in their personal affairs and for their own personal benefit, and that the defendants would resist any disclosure of the actual use of the funds received in response to the defamatory solicitation.

75. In furtherance of the conspiracy, the various defendants joined together to write, duplicate and distribute

literature of the type attached hereto as Exhibits A-F.

76. The conspirators were well aware that they were in fact deceiving others by the dissemination of false and defamatory statements concerning the plaintiff.

77. After the conspiracy was initiated with publication of Exhibit A, none of the defendants took any steps to withdraw from the conspiracy which continued with the creation of publication of Exhibits B-F and other unknown publications of a like kind.

78. The plaintiff was in fact injured a aforesaid by virtue of the conspiracy and the overt acts performed by defendants in concert and in furtherance of the conspiracy.

COUNT V - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

79. Paragraphs 1 through 78 are incorporated herein by reference.

80. The wrongful actions taken by the defendants were outrageous and outside the realm of decency and moral conduct and constitute the intentional infliction of emotional distress.

81. As a direct and proximate result of defendants' wrongful acts, plaintiff has suffered severe emotional distress and anguish.

WHEREFORE, plaintiff requests that relief be granted for an award of compensatory damages in the amount of Five Hundred Thousand Dollars ($500,000), an award of punitive damages, in the amount of One Million Dollars ($1,000,000), treble damages, attorneys fees and costs pursuant to Virginia Code

§ 18.2-500, and for such other and further relief as this Court shall deem proper.

Respectfully submitted,

PHILIP J. HIRSCHKOP,
By Counsel

COUNSEL FOR PLAINTIFF:

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HIRSCHKOP & ASSOCIATES, P.C.
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Post Office Box 1226
Alexandria, Virginia 22313
(703) 836-6595

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Second Amended Motion for Judgment was this 23rd day of October, 1987, mailed, first class, postage prepaid, to: Nicholas S. McConnell, Esquire, Jackson & Campbell,

P.C., 1120 20th Street, N.W., Suite 300 South, Washington, D.C. 20036; Fred H. Codding, Esquire 10382 Main Street, P.O. Box 225, Fairfax, Virginia 22030-0225; Wyatt B. Durrette, Jr., Esquire, McCarthy & Durrette, 700 East Main Street, Suite 1201, Richmond, Virginia 23219; and John D. McGavin, Esquire, Lewis, Tydings, Bryan & Trichilo, P.C., P.O. Box 250, Fairfax, Virginia 22030.

JONATHAN R. MOOK

V I R G I N I A:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

PHILIP J. HIRSCHKOP,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	At Law Nos.
	:	9401
	:	9403
BRUCE W. EBERLE & ASSOCIATES, INC., et al.,	:	
	:	
Defendants.	:	
	:	

Arlington, Virginia
Friday, March 16, 1990

The proceedings commenced at 11:03 a.m.

BEFORE:

THE HONORABLE BENJAMIN KENDRICK

APPEARANCES:

PHILIP J. HIRSCHKOP, ESQ., 108 N. Columbus Street, Alexandria, Virginia 22313
counsel pro se.

WYATT B. DURRETTE, JR., ESQ., Durrette, Irvin & Lemons, 600 East Main Street, Twentieth Floor, Richmond, Virginia 23219, counsel for defendants Richard A. Delgaudio, Cynthia K.

Delgaudio and Richard K.
Delgaudio & Associates, Inc.

FRED H. CODDING, ESQ., 10382 Main Street, Fairfax, Virginia 22030-0225, counsel for Defendant Eberle & Associates, Inc.

STEVEN M. GOMBOS, ESQ., Lewis, Tydings, Bryan & Trichilo, P.C. 4117 Chain Bridge Road, Suite 400, Fairfax, Virginia 22030, counsel for Bruce W. Eberle and Katherine Eberle

P R O C E E D I N G S

MR. DURRETTE: Good morning, Your Honor. As the Court knows, I think, we have a motion to recuse that we've filed in this case. And in arguing the motion, there are several points that I would like to stress and elaborate a bit on some of the cases. But I don't know whether or not the Court has had an opportunity to read the submissions.

THE COURT: Yes, sir.

MR. DURRETTE: You've had an opportunity to read the submissions. There are just several points that I think are important and that ought to be stressed.

First of all, the standard from canon is not a standard of whether or not there is actual bias or bias which the Court recognizes, but whether or not there is,

in the mind of a reasonable person, there is a suspicion of bias.

So it is in our view an objective standard. It is the proverbial reasonable man standard that all of us are used to dealing with in the areas of the law. And we do not rest our motion, nor do we make the allegation of actual bias. We rest our motion on the totality of circumstances here which we believe create in the minds of reasonable men and certainly in the minds of our clients the suspicion of bias. And that is the judicial standard.

In interpreting that standard, Your Honor, the courts have gone to great lengths on many occasions to suggest that the judiciary should, in an effort to insure the integrity of the courts and the public respect for judicial

impartiality, err on the side of recusal whenever there is the possibility in the mind of a reasonable man that there might be a bias. We have cited several cases.

Most of the time -- and in Mr. Hirschkop's brief point by point seriatim, he alludes to situations in which we're talking about judge and lawyer and suggesting that because two lawyers happen to belong to a defense counsel's organization and one of those becomes a judge, that the fact that they belong to that organization would not disqualify that judge from trying cases when that lawyer was appearing before him.

Obviously not. The fact that two lawyers belong to the VTLA, one becomes a judge, obviously not. The fact that a judge and lawyer may know each other,

maybe belong to the same country club, may even play golf together from time to time would not disqualify --

THE COURT: I don't think social encounters is a sufficient basis. I don't think anybody would take issue with that.

MR. DURRETTE: Certainly not. And certainly not with judge and lawyer. We do not have judge and lawyer here. And that's the second point that I want to make. The first point --

THE COURT: You're talking about judge and party.

MR. DURRETTE: And litigant. We're talking about judge and party. We think that creates an entirely different situation.

THE COURT: The standard is the same.

MR. DURRETTE: The standard is the same. But the circumstances that might invoke the standard might be different. It's somewhat of an abstract when a lawyer is before the judge and the client's cause is going to go one way or the other where the lawyer is not directly affected.

But where the person is a litigant, then circumstances that might not affect a recusal with a lawyer we think might with a litigant.

THE COURT: Well, may I ask a question?

MR. DURRETTE: Sure.

THE COURT: This is a law case?

MR. DURRETTE: Yes, Your Honor.

THE COURT: Is a jury requested?

MR. DURRETTE: I believe so. He's requested a jury.

THE COURT: All right. Go ahead.

MR. DURRETTE: There are, I might add -- I don't want to read anything into that question, but I might add that there are a host of procedural issues that would require the Court to rule, most of which are raised by motions currently pending file before Judge Kent.

THE COURT: Legal issues?

MR. DURRETTE: Legal issues, last May. We don't know why the judges of the Alexandria circuit recused themselves. As you know, we would not know that.

THE COURT: They have a policy over there, it's my understanding, that at any time a member of their bar, any member, for any reason is involved in any type of litigation, they as a matter of practice recuse.

MR. DURRETTE: I see. Okay. I was not aware of that.

But, Your Honor, this case has been pending over there for two to three years and Judge Kent had made numerous rulings, including striking several counts. He made numerous discovery rulings and did not recuse himself.

But we filed a motion, we filed several motions that could result in the dismissal of the case. And one of those motions raises the issue of whether or not Mr. Hirschkop is a public figure. And we don't know whether that is what caused people to step back and say, well, maybe we ought not rule on this or not.

But I'm just advising the Court that while there is a jury trial request, there are numerous issues that are going to fall right in your lap and that is one of them. The standard, Your Honor, I think, is one that in any instance in

which there is a reasonable basis to evoke the suspicion on the party, that the Court ought to recuse themselves.

And I would say in this case with Mr. Hirschkop a litigant outside of the Alexandria circuit where any judge in Virginia could take this case, that it particularly, with the accumulation of circumstances --

THE COURT: I didn't volunteer for it, and I've got plenty of business here in Arlington. And I can assure you, I didn't volunteer for it.

When the Supreme Court makes a request, I have a practice of never saying no.

MR. DURRETTE: Well, maybe that's why you have the work load you do, Your Honor.

But in any event, I want to advise the Court of a couple of cases that I think

are important and I want to go into them in a little more detail than we did in our brief. Because one of them, anyway, two of them are from Virginia judges.

The first one is Tip-Pa-Hans Enterprises versus Atco Electric which was decided by Judge Pierson in the Bankruptcy Court in the Western District of Virginia. It's a 1983 case and we cited it in the brief.

But in ruling on the issues, Judge Pierson wrote this. The law goes further than requiring an impartial tribunal. It also requires that the tribunal appears to be impartial. Under this aspect of the rule where the circumstances are such as to create in the mind of a reasonable man a suspicion of bias, there may well be a basis for disqualification, though in fact no bias exists. And he goes on

to elaborate on that point.

The Virginia Supreme Court has decided two cases that we think bear on this, both of them cited in our brief. One is Ewing versus Haas, found in 132 Virginia 215. And on page 224 of that opinion -- and this is an old opinion, obviously, 132 Virginia -- "the stability of our government is dependent on the inflexible integrity of its courts, and the confidence of the public courage, the impartiality and the wisdom of the judges in the prompt administration of even-handed justice to every litigant. The confidence cannot be betrayed with impunity and ought not to be impaired by reasonable grounds of suspicion."

And finally, perhaps most importantly, the case of Stamper versus the Commonwealth, which is a 1985 opinion

written by Judge Russell who, as we all know, came from this circuit. This was a case in which an attorney down in southwest Virginia had, the police had created a situation in which he was retained by some drug dealers and offered to be paid with marijuana and he accepted that marijuana and subsequently was arrested by the police and charged with possession.

He was not from Smith County, I believe is where the incident took place and where the trial was, but he was from a neighboring county and he practiced some before that judge.

So this is a judge-lawyer, not judge-litigant. No recusal motion was made by that defendant. But after the sentencing, the issue of the judge disqualifying himself sua sponte arose

and the defendant attempted to raise it on appeal based primarily on the fact that the defendant attempted to put into evidence his mental condition on the date of the offense, and that afternoon he had tried a case before the judge. So the argument went that the judge, having seen him in court, could not be objective about any mental deficiencies.

And for a lot of reasons, the Supreme Court held that any evidence as to the mental problem was not relevant and, therefore, any impression the judge may have wouldn't bear on his decision anyway.

But in reaching there, Justice Russell, in discussing those issues, wrote a couple of sentences that I think are important. "A trial judge must exercise reasonable discretion to determine

whether he possesses such bias or prejudice as would deny a party a fair trial." "The Canons of Judicial Conduct provide that the judge should disqualify himself if 'his impartiality might reasonably be questioned.' In exercising his discretion in this regard," only the judge -- or, "in exercising his discretion in this regard, the judge must be guided not only by the true state of his impartiality, but also by the public perception of his fairness in order that public confidence in the integrity of the judiciary may be maintained." "If a timely motion for recusal had been made, the trial court might have granted it out of an abundance of caution because of the defendant's law practice in this area."

Now, it's not saying he should have. And it's a totally different state of

facts.

THE COURT: That's the bottom line, isn't it? That's the bottom line. The real question is whether or not I'm comfortable with it, isn't it?

MR. DURRETTE: No, sir, I don't think that's the standard.

THE COURT: You think it's beyond that.

MR. DURRETTE: I think it's beyond that. I don't think any -- you are the only one that knows whether or not you're comfortable.

THE COURT: That's what I'm saying.

MR. DURRETTE: You're the only one that knows whether you have bias. We don't know that. We can't allege that. Bias is never proven ever, as the courts have pointed out, very seldom, by direct evidence. Nobody ever stands up and says I'm biased. It's always circumstantial

evidence and inferences to be drawn therefrom.

But what we're saying to Your Honor, it is a reasonable man standard. It's those circumstances which might suggest the would bias to a reasonable person.

We're saying here that the accumulation of circumstances in particular, even though it's 20 years ago, even though it's only a lawyer referral business, it's an affiliation between you and Mr. Hirschkop with an organization that is one of the critical issues in this case and that will be the subject of quite a bit of attack in this case.

THE COURT: What is that issue?

MR. DURRETTE: The fund-raising letters that were written in this case which Mr. Hirschkop alleged defamed him, in part have to do with whether or not he was

associated with an organization called National Lawyers Guild, his association with that. His interpretation of the letters is one thing. Our interpretation of the letters, what was said, was one thing.

THE COURT: The trier of fact will resolve that.

MR. DURRETTE: The trier of fact may indeed resolve some of that. The Court may resolve some of that.

All we are saying is, this is our bottom line, is that we believe that the combination of former clerkship, social relationship and two of only three lawyers in Virginia listed in this referral directly would create in the mind of a reasonable person a suspicion of bias. And for that reason, we ask that you recuse yourself.

THE COURT: Well, I quite honestly can't tell you 20 years ago what my motivation was for doing what I did then. I suspect, and it's supposition on my part, that it was my attempt, feeble though it may have been, to try to do something for poor people. I have no recollection of even doing it at this date.

But you're suggesting, are you not, that there's a question of politics involved here between these two organizations?

MR. DURRETTE: Politics in a broad and generic sense. Idealogy perhaps more than politics.

THE COURT: Let me ask you a question. Suppose you had a situation where a judge had been a member of, say, the general assembly of the state or Virginia for 20

years or 20 years ago, either one or both, that is predominantly if not almost unanimous democrats. Would the issue of politics or should the issue of politics come into question every time a Republican came before that judge?

MR. DURRETTE: Absolutely not, Your Honor. I would be fighting recusal motions all the time.

THE COURT: I don't think so.

MR. DURRETTE: Absolutely not. As you know, I'm Republican and a fairly, I think well-known Republican. I appear before democratic judges almost everywhere I go. But I would never think of filing a recusal motion nor have I ever felt I should have when the case was over.

And we don't suggest that, that politics in terms of Democratic-

Republican affiliation or not in the judiciary should affect a judge when a lawyer appears before him.

What we are saying is that the combination of all of these things where a litigant appears before you -- I don't even know that we would make the same motion if Mr. Hirschkop were here representing John Doe. I don't want to say this one way or the other. But I will say to the Court that the timing of the motions, we obviously were aware of some of the matters raised by Mr. Yohay, aware of clerkship, and we did not file the motion.

But when we realized that one of the organizations that we're going to be so critical in this case, that even though it's a long time ago, there was that relationship, and we felt that the

accumulation of things were such that we felt that we ought to file it and therefore we have.

And we believe that the reasonable man standard and the suspicion of bias standard is such that this case, with all of the facts accumulated and Mr. Hirschkop being the party who is alleging he was defamed by these allegations, where his personal reputation or perhaps vindication as well as money might be on the line in this case, we just think it ought to be heard by another judge, Your Honor. That's the bottom line.

THE COURT: Thank you. Mr. Hirschkop, would you like to be heard?

MR. HIRSCHKOP: There is other counsel, multiple defendants, Your Honor.

MR. CODDING: We represent some of the other defendants.

THE COURT: I assume you are adopting everything.

MR CODDING: We are, Your Honor.

THE COURT: Anything else you want to add?

MR. CODDING: My name is Fred Codding and I represent Eberle & Associates, one of the other co-defendants. There are extensive motions for summary judgment filed in this cause. There are rulings that the Court is going to have to make prior to a jury ever being sworn in this cause. And I think the crucial item as has been pointed out by Mr. Durrette and yourself in regards to the distinction between social affiliations and a party, Mr. Hirschkop in this particular cause is the plaintiff. And I just want to emphasize that point again, reemphasize that point. That's all.

THE COURT: All right.

MR. HIRSCHKOP: Let me deal with the easier issues first, Your Honor. In the original motion they give five reasons why the Court should disqualify itself.

One is the Court was a law clerk of mine sometime ago. And so the record is clear, sometime about 20 years ago, you were assigned to my firm by a civil rights organization, as I recall, but not paid anything by my firm, I do not believe, and clerked there for like three or four weeks and worked on a few cases. We've cited the law. All people work as clerks.

Interestingly enough, an old associate in my firm stopped by this morning. His wife had clerked for the ex-chief judge of the U.S. Court of Appeals for the District of Columbia circuit and the rule

is that you cannot appear before that judge for one year.

And I remember no lesser light than John Grad, my prior partner, clerked for Judge Robert Merhige, no lesser judge than him, and he appears before Judge Merhige. He's very close to Judge Merhige. And ex-law clerks are always appearing before Judge Bryan in cases in which they are regularly applying for legal fees, the civil rights cases where there is the award of legal fees, anti-trust cases where there's award of legal fees. They have a large financial personal interest. That's a phony thing.

And then they point out a perception of a long-standing friendship. Well, they had an obligation to inquire -- had counsel been very kind and courteous to me -- and I know both senior counsel --

at any rate, had anyone called me, I would have told them unequivocally, of course, I've known the judge 20 years starting with that clerkship when I met him. And we see each other maybe two or three times a year at most at social functions. And maybe for times in one year and one time in another.

I've been in your home once in the last several years to drop some papers off and I was there about an hour. I sat down and had some tea. I see you far, far less than almost any other litigant would see you in a case.

Indeed, I made some notes on this point. I remember Judge Lewis pointing out one time -- and I don't remember whether it was Lou Koutoulakos or others -- how he would go down to the country club here in Arlington and they would sit

around and go play poker and go play golf, and all these good old boys knew each other socially, which is fine. And they regularly appeared before him requesting legal fees.

And indeed, I've appeared before Judge Warriner in Hirschkop versus Ianson, the Fourth Circuit case of national importance on the rights of lawyers to speak out, the free speech rights of lawyers.

I didn't see the people running to say he should not hear that case because his views were way to the right of many other people I have known. And I won't criticize Judge Warriner's .

On the other hand, Dick Shadyac, who represented me, moved to disqualify himself. His views were so anathema not only to mine personally and politically,

but the very point we were pressing. And the attorney general objected and said he couldn't disqualify himself and ultimately moved he couldn't.

Of course, Oren Lewis, I appeared before him many times. His views are quite known to all of us. I've been before many judges, Judge Williams, Judge Merhige, seeking legal fees, before Judge Merhige in a personal case to collect the fees, not to apply for the 1988 award of a fee. And Judge Swersky and numerous others. Wiley Wright, when he was chief judge, awarded me a rather large fee in also a rather major name case under the interference statute, in the interference of business statute, in Virginia the named case, the Osheroff case which someone uses in that somewhat long statute.

And there are all sorts of contacts that lawyers have with judges who appear before them just applying for award of legal fees in domestic relations cases, civil rights cases, sanctions, which are personal awards in many places.

But my contacts with you -- and I want this record to be perfectly plain. I think very highly of you; we've been friends for many years -- are minimal compared to the contacts that many judges have with litigants. It gets to your head, Judge Kendrick, if you feel you can judge the legal issues in this case.

They raise this point three, frequent joint social activity. Well, the perception was just they were rumors. That I've taken care of.

They raised point four: Yohay's petition was pending before the Court of

Appeals. At the time they filed their motion, Yohay's petition had been dismissed two months before by the Court of Appeals.

And it just goes to the fact that doing something this serious, they did not really make an adequate inquiry at all. Just a simple phone call to me would have done this. Responsible counsel like this really should have done it. I'm not asking for sanctions on it because -- I was going to ask you to decide sanctions and I know we've had this issue once before.

But the fifth point is why we're here. Let me read first from their motion. And before I read that, understand this is why you should not grant this, because the integrity of the bench is really involved. This is an attack on you

because your political views. It's an attack on me because of my political views.

He said the perception in the minds of his clients. Well, I would submit that his clients are the lunatic fringe of the right wing of this country. The perception of his clients is meaningless. They would be happy if you were Attilla the Hun. They would be happy if you were right wing of Jerry Falwell or some other like that. That would make them delighted and I then would be fairly tried. They would be delighted if you were someone who thought I was a commie and should have been locked up 20 years ago.

It's no secret in the state how the bar went after me when I sought to get women into the University of Virginia, when I

sought to get integration of the state prison system, when I brought name cases that were nationally significant in the prison system and corrected the prison system.

There were judges who hated me, who spoke out against me publicly in the papers. They would be delighted if they had such a judge in this case.

Well, here's what they said about you. Consequently -- this is the very motion they filed. Consequently, anyone with views sufficiently similar to those of Hirschkop as to be motivated to place his name upon the NLG referral list could hardly be perceived as impartial in judging the issues at stake."

But more pointedly, they say this, lower on on page 3. "Because of the allegations of Judge Kendrick's bias in

favor of Mr. Hirschkop, and Judge Kendrick's apparent association with the NLG," the National Lawyers Guild, "a group whose views and activities the defendants consider inimicable to the best interest of the United States, these defendants believe there is a substantial likelihood that Judge Kendrick would be unable to be truly impartial in this case."

And when I filed my brief pointing out that's just a bit of McCarthy-ism, they said, oh, absolutely not. And then they say, if the judge then persists in hearing this case -- this is in their reply memorandum -- he would be in a position of ruling on a case in which the defendants vehemently attack the organization with which he was associated.

First of all, as a legal matter, that association, if it ever existed, and that organization have nothing to do with this case. This case starts off when these people attack someone -- not these people referring to these attorneys, but their clients -- attack someone, an atheist, in a newsletter and the newsletter was a fund raising scam. They never used the money for any kind of program. It all went back in their pocket.

I was hired. I was paid by the -- I represented the client. I know the name because I taught constitutional law for a while and you have to know the names in constitutional cases. And we settled the case. And in the course of settling it, some very prominent lawyers, Harvey Cohen, among others, said to me you have to sign the settlement. I said, why am

I involved? and I made them produce any other writings, to shorten this up, saying she had hired a communist national attorney Philip Hirschkop.

Well, I'm an ex-green beret. I may be quite liberal, but I am not a communist. I am anything but communist. And the one who signed it was a draft dodger, one of their clients. Kind of ironic.

So I sued them for libel. Well, I no sooner sued for libel than all mailings are still going out. And the mailings are to old people; they are scared. The raise money after money. They raised millions of dollars, to my understanding, for alleged legal fees that couldn't possibly equal out to what we've been in court.

And so I decided to pursue it because it is an scam. And the only reason they

want to get rid of you is because they perceive you being closely tied to a group that is inimicable to the best interest of the United States. They are hoping that you'll disqualify yourself and maybe the Supreme Court will appoint someone who is inimicable to my views, who maybe doesn't believe so much in the Constitution of the United States of America.

I read you the exact language from their motion. That's what it's all about. And honestly, counsel puts it in perspective when he said, well, we knew about this clerkship 20 years ago of a few weeks one summer in my firm when there were several other clerks present. And they knew about the fact that we've been friends for many years as many lawyers are with judges. And they knew

about these other things. They just didn't know about the NLG thing.

So the record will be clear, let me close with that. I have no recollection of my name being in the NLG list 20 years ago. They have never sought to depose me once in this case. They are welcome do so. We can certainly arrange that.

I never paid money to have my name put in that list. That I'm sure about. In those days, I was spending maybe 80 percent of my time doing civil rights work, civil liberties work. I had been in the deep south for many months volunteering to do civil rights work, and my contacts with the National Lawyers group is only in civil rights context. I know I never paid money for it.

And I doubt Your Honor didn't pay money for it that long ago. I don't know how

many got in on the list. If I volunteered, good; I probably volunteered for many lists. And many lawyers and judges appear in lists.

I'm sure Mr. Durrette, who I will concede is a very prominent Republican, ran for state-wide office, appears before judges who were Republicans, appears before bodies of Republicans. And most of all, I know all of us, not to concern Mr. Durrette, appear regularly before tribunals where other lawyers sit in judgment of us. My ex-partner, Ben DiMuro, sits on the state disciplinary board. They judge lawyers they know well. They are not just asking for money. They can take their license away permanently, disbar them.

So I would submit this is all a ruse. They are after your political views.

They want a judge in this case who will not be liberal, but will be ultraconservative.

And I know, for instance, that it's only a question of observing the law. I would hope to believe Your Honor's opposed to the death penalty. Certainly if you were as liberal as they make out, you would be opposed to the death penalty. But you've been able to give out a death sentence when you had to to follow the law. And if you have any questions about that penalty and you can overcome them, you can overcome a lot.

Do what you are charged to do when you take your oath as judge. You shouldn't let them drive you out of this case because they think you have associations with a group that is inimicable to the best interests of the United States.

That's not true. That's a lie.

MR. DURRETTE: Your Honor, let me say two or three things. Number one is that the issue here isn't whether you are a liberal or conservative. We don't care and, frankly, I don't think we know. The issue isn't whether you're for or against the death penalty. The issue isn't whether you and Mr. Hirschkop had a social relationship or whether you law clerked with him, isolated, seriatim, one, two, three.

The issue is whether or not in the mind of a reasonable man there is a suspicion of bias. And we suggest that there is.

Now, this case, you are the third judge this case has been before. Mr. Hirschkop tried to bring this case in the District of Columbia. He had Jacob Stein representing him over there. We appeared

before a District of Columbia Superior Court judge. We don't know anything about that judge and we didn't raise recusal. That judge sent it back to Alexandria.

We have been before Judge Kent any number of times. I have no idea what Judge Kent's political views are and don't care. Neither do my clients. We did not raise the recusal issue.

Mr. Hirschkop said he doesn't remember how he got associated with the NLG and says he didn't pay a fee. Yet in 1968 when his name is also listed in the directory, in the front of the directory, it says that everybody paid a fee to be listed in the directory.

It is nonsense to say that the organization is not going to be a central issue in the case, that we're going to criticize this organization and that for

whatever reason 20 years ago, the two of you were two out of three lawyers who were listed as referral attorneys in Virginia in that directory. That, combined with the other factors in this case, to us clearly means that out of an abundance of caution, this court ought to recuse itself.

We are not forum shopping. We're not judge shopping. We could get -- there is no other judge in Virginia that would have the same instances that you do, Your Honor, in sitting on this case.

There are a hundred other judges that could hear this case without a recusal motion even being filed. And the bottom line isn't that we are forcing you out, that we are forum shopping for a judge that is to the right or left of Attilla the Hun or any other figment of Mr.

Hirschkop's imagination.

The issue is whether or not in the mind of a reasonable man there is a suspicion of bias. And with all due respect, Your Honor, there is enough here to raise it and you ought to recuse yourself.

MR. CODDING: Your Honor, just two things briefly. Nothing in the argument that I made or I believe in Mr. Durrette's argument ever questioned the integrity of Your Honor. It's the appearance of bias.

Mr. Hirschkop painted a number of us over here with a very broad brush that he's complaining has been spread on him. the appearance of bias, Your Honor, is we think the key element that justifies the recusal motion and Your Honor stepping aside.

MR. GOMBOS: My name is Steven Gombos. We join in support of Mr. Durrette's motion, and, reference the point he just raised, ask that you exercise your discretion based on the appearance of bias and applying the standard. And as far as Mr. Hirschkop has characterized this as an attack on your integrity or political views, we submit that Mr. Durrette's motion is not that. And we certainly are not questioning that, Your Honor.

THE COURT: Counsel, thank you for your presentation. I have thought about this issue a great deal and I can honestly say that I took this job with the understanding that it would be difficult and I have yet to be surprised in that regard. Every day it's just one tough call after another.

I take this job very seriously. I don't think I take myself seriously. but I do take this job very seriously. And I took an oath. And I intend to uphold that oath to the best of my ability. I may be frequently wrong but never in doubt. And the higher courts have so ruled. But I'm not going to duck tough calls or tough issues.

I feel it's possible and, in all likelihood, I don't see any problem whatsoever in ruling on the legal issues in this case based solely on the merits, and it has nothing to do with Mr. Hirschkop or Mr. Durrette or anyone else. Legal issues are going to get a straight call from me to the best of my ability.

The motion to recuse is denied. Your exception is noted.

Mr. Hirschkop, will you prepare the order please? Make sure there's an appropriate space for Mr. Durrette and other counsel to note there exception.

MR. DURRETTE: Yes, and I'll circulate it. Thank you.

I'm note sure what action we'll take as a result of the ruling. But there are motions that are before the Court that would be dispositive of the case, and it would be our request that the Court set up a briefing schedule for Mr. Hirschkop to comply with those motions and set it down for a date certain for argument because they do raise elaborate legal issues.

THE COURT: I'll be more than happy to accommodate all of you any way I can. I suggest that you try to arrange a briefing schedule that is suitable for

your calendars and times and I will accommodate you any way I can.

MR. HIRSCHKOP: May I suggest, Your Honor, we pick two dates with the Court's secretary, one for pretrial, sit down and go over it and hammer it out because we won't get it done on a motion docket.

And I've also made discovery motions I want to set down where we can take up all the issues, pending summary judgments and elsewise.

THE COURT: Please tell Miss Gilroy that's your intentions, Mr. Durrette. Whatever date you agree on, whatever time you agree on, assuming that the schedule is not in conflict with the docket that we already have, that she is to accommodate you any way that she can.

MR. DURRETTE: Thank you, Your Honor.

MR. HIRSCHKOP: Thank you, Your Honor.

(At 11:30 a.m. the proceedings in the above-entitled matter were concluded)

CERTIFICATE OF REPORTER

I, Joy R. Dawson, do hereby certify that the foregoing proceedings was taken by me in stenotype and thereafter reduced to typewriting under my supervision; that the foregoing proceedings is a true record; that I am neither counsel for, related to, nor employed by any of the parties to this action; and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

Given under my hand this 20th day of March, 1990.

_____

Joy R. Dawson,
Certificate of Merit,
Registered Professional
Reporter

Supreme Court, U.S.
FILED
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(2)

No. 90-1227

In The

Supreme Court of the United States

October Term, 1990

RICHARD A. DELGAUDIO, *et al.*,

Petitioners,

v.

BENJAMIN N. A. KENDRICK, JUDGE, CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

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JURISDICTION

The petition for a writ of certiorari invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). However, jurisdiction is deficient for each of the following reasons: the petitioners failed to raise a federal question in the state court (*see* Argument 1A below); the judgment below rests on independent and adequate state grounds (*see* Argument 1B below); and the judgment sought to be reviewed is not final (*see* Argument 1C below).

STATEMENT OF THE CASE

The judgment sought to be reviewed in this case is a denial of a petition for a writ of prohibition by the Virginia Supreme Court. The prohibition petition requested the recusal of a state trial judge for personal bias.

Philip J. Hirschkop, a prominent activist, filed a lawsuit against Richard A. Delgaudio, Cynthia K. Delgaudio, and Richard A. Delgaudio & Associates, Inc. (the petitioners in this case), as well as other defendants, in the Circuit Court of Alexandria, Virginia. The lawsuit sought damages for defamation and related tortious misconduct resulting from a conservative fundraising campaign. The fundraising literature at issue associates Hirschkop with the National Lawyers Guild.

The Virginia Supreme Court appointed Judge Benjamin N. A. Kendrick of the Circuit Court of Arlington County, Virginia (the respondent in this case) to hear the case upon recusal of the local judges. Petitioners filed a motion to recuse Judge Kendrick in the trial court which

invoked Canon 3(C) (a) of the Canons of Judicial Conduct for the State of Virginia.[1] Petitioners asked Judge Kendrick to disqualify himself for these reasons: Judge Kendrick had served as a law clerk in Hirschkop's firm some twenty years previously; Judge Kendrick and Hirschkop were "social colleagues"; and Judge Kendrick and Hirschkop were both listed in the 1973 National Lawyers Guild Referral Directory.

A hearing on petitioners' motion to recuse was held in the trial court. Hirschkop made unchallenged assertions that Judge Kendrick's clerkship was limited to one summer on an unpaid basis. Hirschkop further stated that his social contact with Judge Kendrick was limited to approximately two or three chance meetings per year, and that on one occasion he was given tea at the judge's house when dropping off some papers. Judge Kendrick remarked during the course of the hearing that he did not remember the circumstances of the listing in the National Lawyers Guild Directory. Upon consideration of briefs and argument, Judge Kendrick denied the recusal motion.

Petitioners next filed a petition for a writ of prohibition[2] in the Virginia Supreme Court which sought Judge

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[1] "A judge should disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Part 6, § III, Canon 3(C) (a) of the Rules of the Supreme Court of Virginia.

[2] Under Virginia law, a writ of prohibition is a prerogative writ granted only "with great caution and forebearance" upon the exercise of "sound judicial discretion" in cases of "extreme necessity." *See In re Johnston*, 3 Va. App. 492, 495-496, 350 S.E.2d 681, 683 (1986) (quoting *Supervisors of Bedford v. Wingfield*, 68 Va. 329, 333 (1876)).

Kendrick's disqualification. The petitioners again invoked Canon 3(C) (a) of the Canons of Judicial Conduct for the State of Virginia. The petitioners reiterated the same grounds for disqualification urged in the trial court. The Attorney General of the Commonwealth of Virginia filed a demurrer and motion to dismiss on behalf of Judge Kendrick. The Virginia Supreme Court summarily dismissed the petition, which prompted the instant petition for a writ of certiorari to this Court.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION TO REVIEW THIS CASE FOR EACH OF SEVERAL JURISDICTIONAL DEFICIENCIES

A. Petitioners Failed to Raise A Federal Issue in State Court

This Court lacks jurisdiction because petitioners failed to raise a federal question in the state court proceedings. In *Cardinale v. Louisiana*, 394 U.S. 437 (1969), this Court stated that "[i]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." 394 U.S. at 438.

In this case, petitioners raise the federal constitutional due process argument for the first time in this Court. The disqualification issue was framed as a violation of a canon of judicial conduct (a state rule of court) in both the recusal motion heard in the trial court and in the prohibition petition to the Virginia Supreme Court. The prospect of violation of constitutional due process

was raised in neither state forum. Moreover, the decisions of both the trial court and the Virginia Supreme Court are not based on federal authority. Therefore, this petition for a writ of certiorari must be denied for failure to raise a federal issue in the state court.

Conceding that a due process argument was not explicitly raised below, petitioners argue that their contention in state court that recusal was mandated by Canon 3(C) (a) of the Canons of Judicial Conduct is the "equivalent to the standard of due process." Pet. 14. However, in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court explicitly stated that a claimed violation of a judicial conduct canon proscribing personal bias is not the equivalent of a constitutional due process argument. 475 U.S. at 820.

B. The Judgment Below is Based on Independent and Adequate State Grounds

This Court lacks jurisdiction in this case because the judgment complained of rests upon independent and adequate state grounds. It is axiomatic that this Court is without jurisdiction to review a state decision based upon an independent and adequate state ground. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

In this case, Judge Kendrick filed a demurrer and motion to dismiss in response to the petition for a writ of prohibition. The demurrer was based on the following grounds: a writ of prohibition is not a proper remedy for judicial recusal under Virginia law; the facts alleged do not warrant the discretionary exercise of an exceptional, prerogative writ under Virginia law; and the facts alleged

do not constitute violation of any applicable state canon of judicial conduct. The Virginia Supreme Court dismissed the petition upon consideration of respondent's demurrer. Because each and every defense put forward in the demurrer is a matter of state law, this petition for a writ of certiorari must be denied because the judgment below rests on independent and adequate state grounds.

C. The Judgment Complained of is Not Final

This Court lacks jurisdiction because the denial of the prohibition writ is not a "final" judgment as contemplated by 28 U.S.C. § 1257(a). The general rule is that, to be reviewable, the state court judgment "must be subject to no further review or correction in any other state tribunal; it also must be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945).

In this case, the denial of the prohibition writ is an interlocutory step in the underlying defamation action. The anticipated trial of the defamation suit constitutes further proceedings on the merits which precludes finality. Moreover, the issue of Judge Kendrick's recusal is reviewable on appeal upon completion of the defamation action. In sum, this petition for a writ of certiorari must be denied because the judgment complained of is not "final."

Petitioners contend that the judgment sought to be reviewed is "final" under the authority of *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975). Pet. 3. Specifically, petitioners rely on the third category of cases recognized in

Cox in which "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481. However, *Cox* is inapposite to this case because a denial of a prohibition writ which does not explicitly reach the merits is not a bar to subsequent appellate review. *Va. Dept. Corrections v. Crowley*, 227 Va. 254, 262, 316 S.E.2d 439, 443 (1984). The Virginia Supreme Court dismissed the prohibition petition upon consideration of respondent's demurrer without reaching the merits. Therefore, res judicata and collateral estoppel will not bar review of the recusal issue on appeal, thereby removing this case from the definition of finality announced in *Cox*.

II. JUDICIAL DISQUALIFICATION FOR PERSONAL BIAS IS NOT A CONSTITUTIONAL ISSUE

The petition for a writ of certiorari must be dismissed because the record in this case is devoid of an intimation of a due process violation. In *Aetna Life Insurance Co. v. Lavoie*, this Court stated:

> The Court has recognized that not '[a]ll questions of judicial qualification . . . involve constitutional validity. Thus, matters of kinship, *personal bias*, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.'

475 U.S. at 820 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)) (emphasis added).

In this case, the crux of petitioners' argument is the perceived personal bias of Judge Kendrick. However, as

recognized by this Court in *Aetna Life Insurance*, allegations of personal bias in judicial disqualification cases do not reach the stature of a constitutional issue. 475 U.S. at 820. Therefore, this petition for a writ of certiorari must be denied.

CONCLUSION

For these reasons, Benjamin N. A. Kendrick, Judge, Circuit Court of Arlington County, Virginia, respondent herein, prays that the petition for a writ of certiorari will be denied.

Respectfully submitted,

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